affected, and we will not set aside the jury's verdict in this case." App. at 6a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS IN CONFLICT WITH LONGSTANDING PRECEDENTS OF THIS COURT.

The lower court in this case adopted what Judge Kozinski has condemned as "a maverick rule precisely the opposite of that repeatedly announced by the Supreme Court." *Kern v. Levelor Lorentzen, Inc.*, 899 F.2d 772, 790-91 (9th Cir. 1990) (Kozinski, J., dissenting).

In fact, this Court long ago established a bright line rule requiring reversal in civil cases when a jury could have based its general verdict upon inadmissible evidence. In *Maryland v. Baldwin*, 112 U.S. 490 (1884), plaintiff sued the administrators of a decedent's estate, who raised several defenses to the claim. Justice Field, writing for the Court, noted that "if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered." However, the jury returned a general verdict for the defendants, "prevent[ing] us from perceiving upon which plea they found." *Id.* at 493. In such a circumstance, the Court found it "impossible to say what effect [the improper evidence] may have had on the minds of the jury." *Id.* at 494. The Court set forth what has become known as the "*Baldwin*" or "general verdict" rule:

> If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld, for

> it may be by that evidence the jury were controlled under the instructions given.

Id. at 493. The appropriate course, the Court stated, was to order a new trial. *Id.* at 495.

Over the course of more than a century, this Court has consistently reaffirmed its general verdict rule. The Court applied the rule to multi-count claims in *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60 (1907). Plaintiff sued for the wrongful death of her husband in a mine explosion, presenting the jury with eight different allegations of negligence. Following the jury's general verdict for the plaintiff, this Court determined that three of the counts were not supported by evidence. *Id.* at 78-79. Citing *Baldwin*, the Court stated that "where it is impossible from the record to say upon which of the counts of the declaration the verdict was based," the judgment must be vacated. *Id.* at 79. Nor, the Court pointedly added, can the judgment "be sustained upon the theory that substantial rights of the objecting party had not been invaded." *Id.*

Similarly, in *United New York and New Jersey Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613 (1959), plaintiff sued for the death of an electrician working aboard a pilot boat, alleging both the unseaworthiness of the vessel and negligence of the vessel owners. This Court upheld the negligence claim, but concluded that the unseaworthiness claim should not have been submitted to the jury because Halecki was not a member of the ship's crew. *Id.* at 615-19. The Court remanded for a new trial, "for there is no way to know that the invalid claim of unseaworthiness was not the sole basis for the verdict." *Id.* at 619.

In *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), a civil antitrust action, this Court held that it was error to instruct the jury that three overlapping and affiliated entities could be found guilty of conspiring with each other. 370 U.S. 25-26. Because the jury's general verdict in this multi-count case may have rested on that erroneous submission, the Court stated that the *Baldwin* rule required reversal. *Id.* at 29-30.

More recently in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Court held that a general verdict in an antitrust action "cannot be permitted to stand (since it was based on instructions that erroneously permitted liability" in violation of *Parker* and *Noerr* immunity). *Id.* at 384. Significantly, Justice Scalia wrote for the majority that if the evidence was sufficient to sustain a verdict on a separate basis, respondent was not entitled to affirmance of the tainted verdict, but instead to a new trial. *Id.*

The Court's application of the rule in *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993), makes clear that it is the verdict winner who bears the risk that the basis for the jury's general verdict may not be knowable. Thus reversal was required where the district court erroneously instructed that the jury could hold petitioners liable for attempted monopolization under § 2 of the Sherman Act, and "the jury's verdict did not negate the possibility that the § 2 verdict rested on the attempt to monopolize ground alone." *Id.* at 459-460.

This Court's rule remains an eminently sensible one. Where the jury may have decided the case based on inadmissible evidence (as in *Baldwin*),

an improper instruction (*Sunkist*), or an erroneous legal theory (*Halecki*), the legal error clearly affects the substantial rights of the losing party. As the Court has explained, the nature of the general verdict makes it impossible to know whether the jury decision was unaffected by the error. In that circumstance, it is appropriate that the party which benefited from the legal error should bear the risk that harmlessness might be difficult or impossible to prove.

The court below in this case disregarded this Court's established rule. Indeed, it adopted the opposite approach. As in *Baldwin*, there was no indication here that the jury was unaffected by the prejudicial evidence of Smith's intoxication. Indeed, the court conceded that it was "at least as likely" that the jury relied on that evidence to render a defense verdict. App. at 6a. Nevertheless, the court constructed a presumption that the jury ignored the prejudicial evidence of intoxication and instead based its decision solely on BMW's other defense – that the airbag itself was not defective. This presumption, as the court itself indicates, is essentially irrebutable in the face of the jury's general verdict. Plaintiff could prevail on appeal only by showing that it was error to admit evidence of intoxication as contributory negligence *and* that each of BMW's other defenses was also tainted by error. Such a result conflicts with this Court's sensible rule in *Baldwin* and its progeny.

Contrary to the lower court's view, this Court's *Baldwin* rule requires no "speculation" as to the jury's thinking. App. at 6a. It simply establishes a presumption that a prejudicial error affected the decision of the jury. The Eighth Circuit has reversed that presumption and placed an insurmountable burden on the party that was disadvantaged by a

legal error. As a consequence, many errors of law will not be corrected – or, as in this case, not even be addressed.

II. THE COURTS OF APPEAL ARE IN CONFLICT CONCERNING APPLICATION OF THIS COURT'S GENERAL VERDICT RULE.

A. The Majority Rule.

Contrary to the Eighth Circuit's approach, the great majority of circuit courts of appeal faithfully apply this Court's general verdict rule. *See, e.g.*,

Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 134 (1st Cir. 1997);

Morrissey v. Nat'l Maritime Union of Am., 544 F.2d 19, 26 (2d Cir. 1976);

Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 534-35 (3d Cir. 1998);

Crowell v. Angelus Sanitary Can Machine Co., 2000 WL 991616 (4th Cir. 2000) at *3 (reversal required where "the district court erred by instructing the jury on contributory negligence [and] we cannot determine from the general verdict whether the jury's decision was based on a finding that Angelus was not negligent or a finding that Crowell was contributorily negligent.");

Crist v. Dickson Welding, Inc., 957 F.2d 1281, 1286 (5th Cir. 1992);

Virtual Maintenance, Inc. v. Prime Computer, Inc., 11 F.3d 660, 667 (6th Cir. 1993);

Morrison Knudsen Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221 (10th Cir. 1999);

Richards v. Michelin Tire Corp., 21 F.3d 1048, 1056 n.13 (11th Cir. 1994);

North Am. Graphite Corp. v. Allan, 184 F.2d 387, 389 (D.C. Cir. 1950);

Mitsubishi Elec. Corp. v. Ampex Corp., 190 F.3d 1300, 1303 (Fed. Cir. 1999);

B. Harmless Error

Without the benefit of guidance from this Court, a number of circuit courts have grafted onto the *Baldwin* rule a harmless error exception to permit affirmance of a general verdict where the appellate court can state with some degree of certainty that the error below did not affect the jury's decision.

The appellate courts vary in their formulation of the showing required of the party seeking affirmance. *See, for example, Davis v. Rennie*, 264 F.3d 86, 106 (1st Cir. 2001) (appellate court must be "reasonably certain that the jury's verdict did not rest on [an] erroneous basis."); *Bruneau v. South Kortright Central School Dist.*, 163 F.3d 749, 759-60 (2d Cir. 1998) ("reasonable certainty"); *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 122 (3d Cir. 1999) (where erroneous instruction could not "by any stretch of the imagination change the verdict, we need not reverse"); *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187, 1192-93 (4th Cir. 1991) ("[T]he court must remand the case for a new trial unless it is 'reasonably certain' that the jury's verdict was not influenced by" the error.); *Braun v. Flynt*, 731 F.2d 1205, 1206 (5th Cir. 1984), *cert. denied*, 469 U.S. 883 (1984) (the court was "reasonably certain" that the jury verdict was not "significantly affected" by error); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1229 (10th Cir. 1996) (court may affirm when

it can say with "absolute certainty" that the jury did not rely upon the error; the possibility that the jury relied upon the error, "even if remote," requires reversal).

Previously, the Eighth Circuit had also espoused the general rule with a harmless error exception. For example, in *Webber v. Sobba*, 322 F.3d 1032 (8th Cir. 2003), the court concluded that reversal was required where the "jury's general verdict leaves us with no idea whether the jury relied upon the erroneous instruction when rendering its verdict" unless it can be shown that "additional factors make it clear that the error was harmless." *Id.* at 1038. To hold otherwise would lead the court to "invad[e] the province of the jury" to determine the evidence upon which the jury relied. *Id.*

The Ninth Circuit Court of Appeals adopted its own similar approach – one that emphasizes discretion on the part of the reviewing court. *Traver v. Meshriy*, 627 F.2d 934 (9th Cir. 1980), held that when one of several theories submitted to the jury lacked evidentiary support, "the reviewing court has discretion to construe a general verdict as attributable to another theory if it was supported by substantial evidence and was submitted to the jury free from error." *Id.* at 938. Then-Judge Kennedy, wrote for the court that four factors should guide the exercise of this discretion: 1) the potential for confusion of the jury that may have resulted from an erroneous submission of a particular claim; 2) whether the defenses of the losing party applied to the count upon which the verdict is being sustained; 3) the strength of the evidence supporting the count being relied upon to sustain the verdict; and 4) the extent to which the same disputed issues of fact

apply to one or more of the theories in question. *Id.* at 938-39.

Although the Ninth Circuit cases have not been consistent in applying *Traver*, one commentator has concluded that in "in practice they seemed to be functionally equivalent" to the harmless error analysis followed in other circuits. Ryan Patrick Phair, *Appellate Review of Multi-Claim General Verdicts: The Life and Premature Death of the* Baldwin *Principle*, 4 J. APP. PRAC. AND PROCESS 89, 101 (2002).

Some judges have strongly criticized *Traver* and the harmless error exception as inconsistent with the *per se* rule of reversal laid down by this Court in *Baldwin* and its progeny. *See Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 136-37 (3d Cir. 1999) (Cowen, J., concurring in part and dissenting in part); *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 790 (9th Cir. 1990) (Kozinsky, J., dissenting).

On the other hand, courts have explained that the exception is consistent with a narrow interpretation of *Baldwin*. That is, reversal is necessary where it is indeed impossible to know from the general verdict the basis for the jury's decision. Still, provision is made, under this approach, to allow the verdict winner to prove to a reasonable certainty, that the jury could not have been influenced by the legal error. *See, e.g., American Airlines, Inc. v. United States*, 418 F.2d 180, 195 (5th Cir. 1969); *see generally*, Phair, *supra*, at 101, 108-09. Whether such an exception is permissible merits this Court's attention as well.

However phrased, the harmless error exception clearly imposes a considerable burden on

the party seeking affirmance. One commentator writing in 2002 counted only four affirmances on this ground over the course of about 30 years. Phair, *supra*, at 111 n.89.[3] The position espoused by the court below in this case, presuming that the jury was not influenced by legal error, would make such affirmances the rule, rather than the exception.

C. The Minority Position of the Seventh and Eighth Circuits.

The position adopted by the Eighth Circuit in this case most closely resembles that adopted by the Seventh in *McGrath v. Zenith Radio Corp.*, 651 F.2d 458 (7th Cir. 1981). McGrath, the former vice-president of an electronics wholesaler who was not named president after the company was acquired by Zenith, brought suit alleging breach of contract, common law fraud, and violation of federal securities laws. On appeal following a general verdict in McGrath's favor, the court emphasized that "defendants' burden is a heavy one in seeking reversal of the judgment or remand for a new trial." *Id.* at 464. To triumph on appeal, the court stated, defendants must show not only prejudicial error affecting one of plaintiff's claims, but "defendants must show that under none of the three rationales was plaintiff entitled to the award." *Id.*

The court determined that McGrath's common law fraud claim was properly submitted to the jury. However,

---

[3] They are: *Hurley, supra; Bruneau, supra; Henderson v. Winston*, 59 F.3d 166 (4th Cir. 1995); and *Braun v. Flynt, supra*. Counsel has identified one additional such affirmance, *Davis v. Rennie*, 264 F.3d 86 (1st Cir. 2001).

> Even if we assume arguendo that the instruction relating to the securities violation was erroneous it cannot be shown, other than on the basis of speculation or conjecture, to have affected the jury's decision, there being a totally adequate independent theory upon which the verdict may have rested.

Id. at 472. The court added, foreshadowing the Eighth Circuit's own rationale, "It would be an abuse of our powers of appellate review to upset the judgment below on the basis of mere speculation." *Id.*

The minority rule has been strongly criticized. Judge Kozinski sharply rejected *McGrath* as contrary to this Court's settled rule:

> The Seventh Circuit, for reasons of its own, has adopted a maverick rule precisely the opposite of that repeatedly announced by the Supreme Court. In order to win on appeal in the Seventh Circuit, the defendant must show that *none* of the plaintiff's theories will support the general verdict. . . . For reasons explained in *Baldwin*, this rule makes no sense at all, never mind that it contravenes Supreme Court authority.

Kern v. Levelor Lorentzen, Inc., 899 F.2d 772, 790-91 (9th Cir. 1990) (emphasis in original) (Kozinski, J., dissenting). *See also* Elizabeth Cain Moore, *General Verdicts in Multi-Claim Litigation*, 21 MEM. ST. U.L. REV. 705, 729 (1991) (*McGrath* "goes even farther than a discretionary harmless error analysis and directly conflicts with United States Supreme Court

precedent."); Phair, *supra*, at 121 ("The *McGrath* decision thus turned the *Baldwin* principle on its head.")

Like *McGrath*, the Eighth Circuit's decision in this case contradicts the general verdict rule established by this Court and followed by the great majority of federal courts of appeal. This Court should grant the Petition for a Writ of Certiorari, both to vindicate its established rule and to clarify for the courts its application.

III. THE QUESTION PRESENTED IS OF GREAT IMPORTANCE TO THE ADMINISTRATION OF JUSTICE IN CIVIL ACTIONS IN FEDERAL COURT.

Application of the correct standard for appellate review of general verdicts is a matter of great practical importance to a large number of litigants in a wide variety of civil cases. "Most jury-tried civil cases in federal courts are resolved, and always have been, by a general verdict." 9A Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 2501 (2005 Supp.). It is fair to state that a great many such cases involve multiple claims or defenses that set the stage for application of the Court's general verdict rule.

That rule applies to all manner of civil actions under federal statutes as well as to claims under state law in diversity cases. It does not discriminate between plaintiffs and defendants. To all parties, the rule is certainly of great import. It determines whether his or her substantial rights will be vindicated, or whether, under the Eighth Circuit's view, remedy for legal error at trial lies out of reach on appeal.

The lower court's view foreshadows an erosion of the quality of justice in the federal courts. Errors of law will become embedded in judgments, insulated by an insurmountable presumption of harmlessness. Moreover, that view hampers the careful development of the law. It invites courts to choose the path taken by the court below, finding it unnecessary to declare what the law is in favor of stating that any error could not be grounds for reversal. Review by this Court is needed to reaffirm and clarify the responsibility of the appellate courts.

CONCLUSION

For the aforementioned reasons, the Petitioner respectfully requests that the Petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals,
Eighth Circuit.

REGIONS BANK, Guardian of the Estate of
Kimberly Renea Smith,
Appellant,
v.
BMW NORTH AMERICA, INC.; BMW AG,
Appellees.
No. 04-2273.

Submitted: Jan. 12, 2005.
Filed: May 9, 2005.
Rehearing and Rehearing En Banc Denied June 24, 2005.

E. Gregory Wallace, argued, Buies Creek, North Carolina (Sandy S. McMath on the brief), for appellant.

Colvin G. Norwood, Jr., argued, New Orleans, Louisiana (Margaret Diamond and M. Stephen Bingham on the brief), for appellee.

Before LOKEN, Chief Judge, HANSEN and MURPHY, Circuit Judges.

HANSEN, Circuit Judge.

Kimberly Renea Smith was rendered a quadriplegic after she lost control of her BMW 318i on a downhill curve. The car struck the hillside, rolled over onto its roof, and eventually came to rest. The driver's-side frontal-impact airbag did not deploy. Smith [FN1] sued BMW, alleging that the airbag's failure to deploy was the result of a defect or BMW's

negligence, that she suffered enhanced injuries during the collision with the hillside as a consequence of the airbag's failure to deploy, and that BMW was liable for these enhanced injuries. After a trial, a jury rendered a general verdict in favor of BMW, and the district court [FN2] entered judgment on the jury verdict.

> FN1. In this opinion, we will refer to Smith and Regions Bank, the legal guardian of her estate, collectively as "Smith." We will refer to BMW North America and BMW AG collectively as "BMW."
>
> FN2. The Honorable James M. Moody, United States District Judge for the Eastern District of Arkansas.

Smith appeals, arguing that the district court abused its discretion by permitting BMW to introduce evidence at trial relating to her blood alcohol level at the time of the car accident. For the reasons discussed below, we affirm.

I.

Prior to trial, Smith moved in limine to exclude evidence relating to her blood alcohol content at the time of the car accident. (D. Ct. Docket # 245.) After a hearing, the district court denied Smith's motion, concluding that the evidence was relevant to BMW's theory "that it was the collision itself and the subsequent rollover of the vehicle that caused the injury." (Mot. Hr g Tr. at 28-30.)

At trial, the parties stipulated that when Smith's blood was tested approximately two hours after the accident, her blood serum alcohol level was . 136

percent. (Trial Tr. at 98.) BMW called Dr. Henry Simmons to testify. He noted that Smith's blood was tested a second time approximately four hours after the accident, and her blood serum alcohol level at that time was .096 percent. Based on this data, he estimated that Smith's blood serum alcohol level was .176 percent at the time of the accident. Dr. Simmons described a typical person with that level of alcohol in her blood as being emotionally unstable, having decreased inhibitions, having reduced ability to make critical judgments, having impaired memory, having impaired ability to understand information, and having decreased response time and muscular coordination. He opined that a typical person would have to drink at least four-and-a-third twelve-ounce cans of beer or six-and-a-half ounces of eighty-proof liquor to achieve that blood alcohol level. (*Id.* at 961-75.)

Dr. Simmons was the only defense witness who testified about Smith's blood alcohol content. BMW's remaining witnesses, two engineers and a doctor, testified about the car's impact with the hillside and subsequent rollover, the design of the car's airbag, and how Smith's injuries occurred.

At the jury instructions conference, Smith stated that she had no objections to the instructions or verdict forms prepared by the district court. (*Id.* at 1393.) In relevant part, the district court instructed the jury as follows.

The jury was instructed that Smith had asserted two separate grounds for recovery of damages. First, she should recover if she proved that BMW supplied the airbag in her car in a defective condition which rendered it unreasonably dangerous, and that the

defective condition was a proximate cause of her injuries. Second, Smith could recover if she proved that BMW was negligent and that its negligence was a proximate cause of her injuries. Proximate cause was defined for the jury, and the jury was instructed that there could be more than one proximate cause of Smith's injuries. (*Id.* at 1415-16, 1418-19.)

The district court instructed the jury that, if it determined that Smith was without fault for the proximate cause of her injuries, she was entitled to recover damages in full. If the jury determined that both Smith and BMW were at fault, but that Smith's fault was less than BMW's fault, Smith was entitled to recover reduced damages. If the jury determined that BMW was without fault, or that Smith's fault was greater than or equal to BMW's fault, Smith was not entitled to recover any damages. (*Id.* at 1422.)

Regarding intoxication, the district court instructed the jury that it was unlawful under Arkansas law for a driver with a blood alcohol level of.10 percent or greater to operate a motor vehicle. A violation of this statute did not necessarily constitute negligence, the jury was instructed, but did constitute evidence of negligence to be considered along with all of the other evidence in the case. An intoxicated person is held to the same standard of care as a sober person, the jury was told, and intoxication does not excuse the failure to exercise ordinary care. (*Id.* at 1417-18.)

Finally, the district court explained to the jury how it should fill out the general verdict forms. If the jury found for Smith under either of her two theories of liability, then it should return the form reading, "We, the jury, find for the plaintiff and fix her damages at

___ dollars." If the jury found that Smith had failed to prove either of her two theories of liability, or that her fault was equal to or greater than BMW's fault, then it should return the form reading, "We, the jury, find for the defendants." (*Id.* at 1424.) The jury returned the latter verdict form. (Appellees' App. at A.)

II.

Smith argues that she is entitled to a new trial because the district court erred by admitting evidence relating to her blood alcohol level at the time of the accident. We will only grant a new trial if the district court clearly abused its discretion by admitting the evidence, which requires a showing that the error prejudicially influenced the outcome of the trial. *See Lovett v. Union Pac. R.R. Co.*, 201 F.3d 1074, 1080 (8th Cir.2000). In this case, as in *Lovett*, we do not reach the question whether the district court properly applied Arkansas law by admitting the evidence because Smith has failed to prove that the outcome of the trial was prejudiced by the admission of the evidence. *See id.*

To determine whether evidence of Smith's blood alcohol level prejudicially influenced the outcome of the trial, we look to the jury's verdict. *See id.* As noted above, the verdict reads in its entirety: "We, the jury, find for the defendants."

"We have no way of determining from this general verdict why the jury found [BMW] not liable." *Id.* It is possible, as Smith argues, that the jury reached this verdict by assigning fault to Smith on the basis of her alcohol consumption, comparing her fault to BMW's fault, and concluding that Smith's fault was equal to or greater than BMW's fault. However,

there are two other possibilities that are at least as likely, neither of which rests on the evidence of Smith's blood alcohol content. First, BMW put on evidence at trial from which the jury could reasonably conclude that there was no defect or negligence because the force and direction of the car's impact into the hillside were insufficient to trigger deployment of a properly operating driver's-side frontal-impact airbag. Second, BMW put on evidence at trial from which the jury could reasonably conclude that Smith's injuries occurred during the rollover-when deployment of the airbag would not have helped, as Smith conceded-rather than during the impact of the car into the hillside.

Evidence of Smith's blood alcohol level was by no means the centerpiece of BMW's defense. In the eight-day jury trial, Dr. Simmons' entire time on the witness stand was approximately one hour and fifteen minutes. "[T]he case was submitted on a general verdict form, so we can only speculate whether [Smith] was prejudiced. Speculation, however, is not a sufficient basis for finding a plaintiff's substantial rights were affected, and we will not set aside the jury's verdict in this case." *Id.* Accordingly, we affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-2273

Regions Bank, Guardian of the Estate of Kimberly Renea Smith,	*	
Appellant,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
vs.	*	
BMW North America, Inc.; BMW, AG,	*	
Appellees.	*	

The petition for rehearing en banc is denied.

The petition for rehearing by the panel is also denied.

(5128-010199)

June 24, 2005

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

No. 05-375

In The Supreme Court of the United States

REGIONS BANK, GUARDIAN OF THE ESTATE OF KIMBERLY RENEA SMITH,

Petitioner,

v.

BMW NORTH AMERICA, INC., AND BMW AG,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Question posed by the Petition does not take into account significant procedural events and findings made by the Court of Appeals, which show that this case does not squarely present the issue Petitioner raises and is not appropriate for review by this Court. Respondents suggest the following as a more complete and accurate statement of the Question:

Whether this Court should presume error in the trial court's resolution of a state law issue concerning the admissibility of evidence supporting an affirmative defense of comparative fault in order to require the Court of Appeals to examine a general verdict in favor of Respondents and make a determination of the jury's specific findings on the issues underlying that verdict, even though

- the Court of Appeals did not find legal error;
- Petitioner agreed to submit the case on a general verdict form knowing such a verdict would preclude a determination on appeal that the jury reached the issue of Smith's comparative fault;
- Petitioner did not object to the jury instruction that driving while intoxicated could constitute comparative fault under Arkansas law in the circumstances of this case;
- Petitioner did not assert on appeal that the evidence was insufficient to support the verdict for BMW on the merits of the products liability claim; therefore, the Court of Appeals could not find that Petitioner was prejudiced by the alleged error; and

QUESTION PRESENTED – Continued

- the Court of Appeals concluded that there were two independent factual bases for the jury's rejection of Petitioner's claim, neither of which required consideration of the allegedly tainted evidence, and each of which was at least as likely a reason for the verdict as a determination that Smith's fault was equal or greater than Respondents' fault.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondents, BMW of North America, Inc., and BMW AG, disclose the following corporate affiliations:

BMW AG is the parent company. No publicly held company owns 10 percent or more of the stock of BMW AG. BMW of North America, LLC, successor to BMW of North America, Inc., is a wholly owned subsidiary of BMW US Holding Corp., which in turn, is a wholly owned subsidiary of BMW AG.

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STATEMENT OF THE CASE

Kimberly Smith sustained a severe cervical injury in a single-vehicle accident that occurred about 4 a.m. on August 24, 1997, when she lost control of her 1994 BMW 318i, which ran off the road into the side of a hill and rolled over several times along the edge of the pavement. Smith sued the distributor and manufacturer of her vehicle, Respondents, BMW of North America, Inc., and BMW AG (collectively "BMW"), in federal district court, claiming that her injury was caused by a malfunction of the driver's air bag, which she contended should have deployed when the vehicle struck the hillside. This alleged malfunction was Smith's only claim of defect under the Arkansas Product Liability Act, Ark. Code Ann. § 16-116-101 *et seq.*, and the only basis for alleging that BMW negligently designed the 318i. Smith did not claim that the design or manufacture of the vehicle caused or contributed to the accident: the accident was caused entirely by Smith's inability to maintain control of her vehicle due to intoxication.

BMW's answer denied liability and pleaded the affirmative defense of comparative fault under the Arkansas Comparative Fault Statute, Ark. Code Ann. § 16-64-122, which permits a claimant to recover only if his or her fault is "of a lesser degree" than the fault of the defendant. The statute broadly defines "fault" as "any act, omission, conduct, risk assumed, breach of warranty, or breach of any legal duty which is a proximate cause of any damages sustained by any party. . . ." BMW contended that, even if it were found at fault for the design of the vehicle, Smith's greater fault in causing the accident barred recovery.

BMW contended that this defense permitted the introduction of evidence of Smith's stipulated blood alcohol content, as interpreted by a toxicologist, as proof of comparative fault under Arkansas law. Petitioner moved to exclude the evidence.[1] Judge James M. Moody denied the motion: "I'm going to permit the evidence of the blood alcohol content and also the testimony of Dr. Simmons (the toxicologist) as to the effect of that amount of alcohol on a driver such as Ms. Smith and as to whether or not it produced the collision which eventually led to her injuries." The district court limited any potential for unfair prejudice to Petitioner by allowing Petitioner to strike for cause the only prospective juror who indicated that he would be unable to find in Petitioner's favor because of the evidence of Smith's intoxication.

At trial, as permitted by the district court, BMW introduced the opinion of an expert toxicologist who testified that at the time of the accident Smith's blood alcohol content was .176 percent. He concluded that such a blood alcohol level would diminish a person's ability to operate and control a motor vehicle. The alcohol evidence permitted by the district court was brief and to the point. In eight days of trial, the toxicologist was the only witness who gave substantive evidence concerning Smith's alcohol consumption and its effects.

Apart from this relatively brief testimony, the subject of Smith's intoxication was raised almost entirely in

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[1] Smith previously had filed a similar motion when the case was set for trial before Judge William Wilson, who later was recused when Regions Bank substituted as plaintiff. Judge Wilson, an author of the Arkansas comparative fault statute, ruled the alcohol evidence admissible.

Petitioner's counsel's questioning and argument.[2] Petitioner's counsel seemingly invited prejudice against his client. While cross examining the toxicologist, Petitioner's counsel pressed for details concerning Smith's tolerance for alcohol "or anything like that."[3] Judge Moody interrupted the questioning and asked Petitioner's attorney why he was attempting to present such evidence. The judge concluded that he did not believe that the witness intended to violate the *in limine* order concerning admission of alcohol evidence, and Petitioner's counsel chose not to ask for a limiting instruction or other remedy.[4]

Petitioner did not object to the jury instructions on comparative fault and the relevance of Smith's blood alcohol content. Therefore, the judge charged the jury without objection as to the "rules of the road" to be used in determining whether Smith was negligent and then instructed, under the Arkansas Comparative Fault Statute, that

> If you should find that the injuries were proximately caused by the fault of both Kimberly Smith and the defendants, then you must compare the percentages of their fault. And if the

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[2] Petitioner's counsel's references to alcohol are similar to those of the attorney whose objection to alcohol evidence was rejected in *Miles v. General Mtrs. Corp.*, 262 F.3d 720, 723 (8 Cir. 2001) ("Miles himself first raised the issue of alcohol consumption in *voir dire*, in his opening statement, and on direct examination of several witnesses in his case in chief.").

[3] The Petition quotes the toxicologist's testimony that Smith was a "problem drinker," a statement that was elicited by Petitioner's pointed cross examination.

[4] Petitioner's counsel's reaction to Judge Moody's caution was "I will just roll with it." (Transcript p. 994)

> fault of Kimberly Smith was of less degree than the fault of defendants, then Regions Bank, as her guardian, is entitled to recover any damages sustained as a result of the occurrence, after you have reduced them in proportion to the degree of the fault of Kimberly Smith.
>
> On the other hand, if the defendants were not at fault, or if the fault of Kimberly Smith was equal to or greater than the fault of the defendants, then Regions Bank, as the guardian of the estate of Kimberly Smith, is not entitled to recover any damages.

Like his questioning of the toxicologist, Petitioner's counsel's closing argument invited prejudice[5] by focusing not only on Smith's drinking, but by explicitly suggesting that she might be guilty of other completely irrelevant misconduct that had not been even implied by the evidence:

> As the Judge said, negligence that is a cause, a proximate cause of her own injuries. Remember, we went through this on *voir dire*. . . . You remember, we've had half a dozen people[6] get up and answer the question honestly. "No matter what the evidence shows, even if it shows her drinking didn't have anything to do with the air bag not working, I still couldn't find for her because I have this real strong philosophical belief,

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[5] BMW submits that this record precludes a reasoned analysis of whether the alleged error in the admission of the alcohol evidence prejudiced the jury against Smith because any prejudice easily could have been caused by Petitioner's counsel, not by the evidence.

[6] One prospective juror – not half a dozen – indicated that the alcohol evidence would influence his decision. He did *not* state his views using the inflammatory language Petitioner's counsel attributed to him.

> if you're drinking, you deserve what you get, and out you go." The rest of you answered honestly that that would not influence you, that you would decide the case on its facts. . . . When you sue BMW, or any of these big corporations, they know how to use the discovery that you have to honestly respond to. Interrogatories, they're called. Formal questions. And if you leave something out, and you swear it's all there, that's perjury. You go to jail. And don't think they don't troll these documents to check against lies that were told so everybody has to tell the truth. You want to do it anyway. So you think about, in your background, all the things that you've forgotten, that you've atoned for, that you've been to church for, that are part of the past that all of us have, you get into that condition (pointing), and you have to come to court – because you don't have any other alternative. They hire paralegals to go out, and they dig and they dig, and they take that information and they put it all together. Let me tell you something. If there was one instance in her life of drug use, of possession of methamphetamines, of cocaine, of all the bad stuff, the monsters that lurk in the shadows, any conviction for any felony, DWI, any conviction, they'd have it in here. There is none. They don't have it. And they have looked. Don't think they haven't spent hundreds of hours trying to dig up all the dirt on her they can. And they don't have it. But they had this toxicologist whose testimony was if you drink, you're not going to be able to control your vehicle as well as when you're sober. We know that.

BMW's closing contrasts starkly with Petitioner's florid argument. BMW's counsel addressed the comparative fault issue as follows: